# 83-6231

NO. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1984



---



| | | |
|---|---|---|
| JAMES RONALD MEANES, | § | PETITIONER |
| VS. | § | |
| THE STATE OF TEXAS, | § | RESPONDENT |

---

PETITION FOR WRIT OF CERTIORARI FROM THE COURT OF
CRIMINAL APPEALS OF THE STATE OF TEXAS

---

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

3. **WHETHER PETITIONER WAS DENIED DUE PROCESS BY THE TRIAL COURT'S OVERRULING PETITIONER'S OBJECTION TO THE COURT'S CHARGE TO THE JURY AT THE GUILT/INNOCENCE STAGE OF THE PROCEEDINGS BECAUSE THE CHARGE FAILED TO DEFINE MURDER AND CAPITAL MURDER.**

## JURISDICTION

The Texas Court of Criminal Appeals affirmed Petitioner's conviction on September 14, 1983. Petitioner timely filed a Motion for Leave to File Motion for Rehearing and Motion for Rehearing which was denied on November 9, 1983.

Jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), Petitioner having asserted below and herein defamation of rights secured by the Constitution of the United States. The opinion of the Texas Court of Criminal Appeals affirming Petitioner's conviction was clearly based on Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment Rights and the Supreme Court's decision in **Witherspoon v. Illinois**, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d. 7776 (1968); **Woodson v. North Carolina**, 428 U.S. 280, 96 S.Ct. 2978,49 L.Ed.2d. 944 (1976); **Lockett v. Ohio**, 438 U.S. 586, 93 S.Ct. 2954, 57 L.Ed.2d. 973 (1978); and **Enmund v. Florida**, ___U.S.___, 102 S.Ct. 3368, 73 L.Ed.2d. 1140 (1982).

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment of the United States Constitution:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public use, without just compensation.

The Sixth Amendment of the United States Constitution:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed by the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The Eighth Amendment of the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

The Fourteenth Amendment of the United States Constitution, Section I:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT OF THE CASE

## PROCEEDINGS IN THE TRIAL COURT

Petitioner was charged by indictment with the felony offense of capital murder under V.T.C.A. Penal Code §19.03(a)(2). The case was submitted to the jury alleging that Petitioner intentionally caused the death of Olivero Flores by shooting him with a gun in the course of commiting and attempting to commit the robbery of Flores. Petitioner was found guilty of capital murder as alleged in the indictment. The jury answered the two questions under V.A.C.C.P. Article 37.071 affirmatively, and the Court assessed Petitioner's punishment at death. The facts of the case were summarized by the Texas Court of Criminal Appeals

as follows:

> The deceased was a guard for the Purolator Company. He was murdered on April 21, 1981, in the parking lot of a Sage store near the Gulf Freeway in Houston, Harris County, Texas. The deceased was walking from the Purolator van toward the store when two shots were fired by Appellant or his accomplice, Carlos Santana. Only one bullet entered the deceased's body. Nobody saw whether Appellant or Santana fired the fatal shot. After the deceased was killed, both robbers fired continuously into the van where the deceased's partner, Dorothy Wright, was hiding on the floor. Witnesses to the robbery-murder testified that one of the robbers carried a shotgun and the other carried a pistol. The medical examiner could not determine whether the bullet that killed the deceased came from a shotgun or a pistol.

At trial, the judge told the venirepanel that a non-trigger man and a trigger man were equally guilty under the law of parties and that the law of parties could be used by the jury in answering Special Issue Number One at the punishment stage. However, no objection was made by defense counsel to the Court's instruction. At the punishment hearing, Petitioner testified that he had played only a minor role in the preparation of the offense. He stated that Santana had pulled the trigger of the gun that actually killed Flores and that he had agreed to participate in the robbery only on the condition that no one would be injured. (R. at 10-28). Petitioner also introduced Defendant's Exhibit 5, a written statement he made to police at the time of his arrest in which he denied any intent to kill anyone and blamed Santana for commission of the murder.

## APPELLATE PROCEEDINGS

Petitioner's conviction was automatically appealed to the Texas Court of Criminal Appeals as provided in V.A.C.C.P. Article 37.071(f). On appeal, Petitioner argued that it was fundamental error for the trial court to instruct the venirepanel that the law of parties could be used in answering Special Issue Number One at the punishment stage of trial in that it violated Petitioner's Fifth, Sixth, Eighth, and Fourteenth Amendment

Rights citing **Enmund v. Florida**, **supra**; **Lockett v. Ohio**, **supra**; and **Woodson v. North Carolina**, **supra**.

The Texas Court of Criminal Appeals however held that the trial court's instruction to the veniremen did not violate **Enmund**, **supra**, because both the trial court's and the State's hypotheticals assumed that the gunman attempted to kill his victim or intended or contemplated that life would be taken. The court also held that there was no violation of **Lockett**, **supra**, or **Woodson**, **supra**, even though the Texas Court of Criminal Appeals stated:

> "Arguably, the complained of remarks by the Court may raise a question under **Lockett** and **Woodson** since the veniremen were asked if they would agree under the hypothetical circumstances that both parties were guilty without any mention of mitigating circumstances."

Petitioner also contended that V.A.C.C.P. Article 37.071(b)(1) is unconstitutional as applied in Petitioner's case because its language indicates that the law of parties also applies in answering Special Issue Number One at the punishment stage. The Texas Court of Criminal Appeals, in finding no error, reasoned that:

> "The trial court never informed Frost that she had to render a guilty verdict or answer Special Issue Number One 'yes', in the case of the hypothetical gunman who shot, but did not hit his target."

In Petitioner's Sixteenth Ground of Error, he asserted that the trial court committed reversible error by denying Petitioner's objection to the jury charge at the guilt/innocence stage because the charge failed to define murder and capital murder. This Ground of Error was overruled. And on appeal, Petitioner argued that the trial court erred in granting the State's motion to strike venire member Sandra Gail Richardson for cause because it was not sufficiently shown that she would automatically vote against the death penalty regardless of the facts. This Ground of Error was also overruled. Petitioner's Motion for rehearing was denied on November 9, 1983.

## REASONS FOR GRANTING THE WRIT

### OVERVIEW

In the majority opinion, the Texas Court of Criminal Appeals incorectly applied the rules of **Enmund v. Florida**, **supra**; **Lockett v. Ohio**, **supra**; and **Woodson v. North Carolina**, **supra**, in affirming Petitioner's conviction. The Court found no violation of **Enmund** in the Court's instruction to the venirepanel on the law of parties because the Court found that in the hypothetical situations given to the venire panel it was assumed that the gunman attempted to kill or intended that life would be taken. The Court also found no reversible error under **Woodson** or **Lockett** even though the Court conceded that the question asked of venireman McCarter "may have raised a question under **Lockett** and **Woodson**. The hypothetical question asked the jurors to agree that a gunman who did not fire the fatal shot would be equally guilty and would still be acting deliberately and with reasonable expectation that death would result. The Court recognized that under the hypothetical situations the veniremen were asked to agree that both parties were equally guilty without any mention of mitigating circumstances, but concluded that there was no error preserved for review.

The reasoning of the Texas Court of Criminal Appeals and the application of the law of parties to Special Issue Number One has deprived Petitioner due process of law by keeping the jury from considering mitigating circumstances at the punishment stage as constitutionally required. The problem is further compounded by the lack of guidance given the jury in answering Special Issue Number One which asks the jury whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result, "without defining the term 'deliberately'."

The Texas Court of Criminal Appeals has continually held

that the jury need not be instructed on the meaning of the term "deliberately". The Texas Court has stated that "deliberateness" is different and substantially greater than the "intentional" requirement necessary to find an individual guilty of capital murder. Pearence v. State, 620 S.W.2d 577 (Tex.Crim.App. 1981). A jury thereby may sentence an individual to death without affording him any individualized sentencing.

Furthermore, the Texas Court of Criminal Appeals has failed to address the need for the balancing of mitigating and aggravating factors as required by the United States Constitution and by Lockett, Woodson, and Enmund, in relation to the jury's answer to Special Issue Number One under Article 37.071. In Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d. 859 (1976), the Court held that capital sentencing schemes should not create "a substantial risk that the death penalty will be inflicted in an arbitrary and capricious manner." This Court has recognized the need for individualized determination as to the character and record of the accused and the specific circumstances of the offense before a death penalty may result. The Texas Court of Criminal Appeals has failed to adopt any specific means of requiring and guiding a jury to make an individualized "death decision". The Texas Court of Criminal Appeals has allowed a conviction based upon defined aggravating factors, including the law of parties, without requiring that any mitigating factors be explained to the jury or that the term "deliberateness" be defined.

This court has consistently recognized that juries need guidance in applying the law to the facts of a particular case. This is true at the guilt/innocence stage, as well as at the punishment stage of a trial. This court has continuously recognized that in capital cases it is of "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason, rather than caprice or emotion." Beck v. Alabama, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d. 392 (1980), citing Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204. Therefore, failure

to charge the jury on a lesser included offense of murder in a capital murder case also denies the accused due process of law and violates this Court's recent decision in Beck v. Alabama, supra, and Hopper v. Evans, 456 U.S. 605, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982).

The rule of Witherspoon v. Illinois, supra, was also violated in Petitioner's case due to the exclusion of venireperson Sandra Gail Richardson, who represented the classic equivocating venireperson. In Witherspoon, supra, this court held that a venireperson may be excused for cause only if irrevocably committed before trial to vote against the death penalty. Clearly, Ms. Richardson's responses did not conform to the requirements set forth by this Court in Witherspoon, supra. Therefore, because Petitioner raises several important constitutional issues which require consideration by this Court, this Petition for Writ of Certiorari should be granted.

I.

**THE TRIAL COURT ERRED IN THAT IT DENIED PETITIONER DUE PROCESS OF LAW BY INSTRUCTING AND PERMITTING THE PROSECUTION TO INSTRUCT THE VENIREMEN THAT THE LAW OF PARTIES AS DEFINED BY VERNON'S ANNOTATED PENAL CODE §7.02(b) COULD BE USED IN ANSWERING SPECIAL ISSUE NUMBER ONE AS REQUIRED BY V.A.C.C.P. ART. 37.071 AT THE PUNISHMENT STAGE OF HIS CAPITAL MURDER TRIAL AS WELL AS THE GUILT/INNOCENCE PROCEEDINGS.**

This Court has consistently held that due to the uniqueness of the death penalty, it cannot be imposed under sentencing procedures that create a substantial risk that it will be inflicted in an arbitrary and capricious manner. It has also been recognized that even under fair procedural rules, there is no guarantee that the death penalty will not be imposed arbitrarily unless the jury is given careful guidance due to the fact that members of the jury are "unlikely to be skilled in dealing with the information they are given." Gregg v. Georgia, supra.

Therefore, it is necessary that jurors in a capital case be given adequate information and instruction at all stages of

trial. This Court has set forth certain guidelines to be followed in all capital cases in an attempt to ensure that the jury does in fact receive proper guidance and all necessary and relevant information. In Lockett v. Ohio, supra, this Court held that "the sentence must be free to give independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation." This Court further stated in Zant v. Stephens, 456 U.S. 410, 102 S.Ct. 1856, 72 L.Ed.2d. 222, (1982), that:

> the existence of one or more aggravating circumstances "serves as a bridge that takes the jury from the general class of all murders to the narrower class of offenses the state legislature has determined warrant the death peanlty. After making the finding that the death penalty is a possible punishment, the jury then makes a separate finding whether the death peanlty should be imposed. It bases this finding 'not, upon the statutory aggravating circumstances but upon all the evidence before the jury in aggravation and mitigation of punishment which has been introduced at both phases of the trial'." 456 U.S. at 416, 102 S.Ct. at ___, 72 L.Ed.2d. at 227. (Emphasis added.)

In Woodson v. North Carolina, supra, this Court stated that:

> "This Court has previously recognized that '(f)or the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender. Pennsylvania ex rel. Sullivan v. Ashe, 302 U.S. 51, 55, 58 S.Ct. 59, 61, 82 L.Ed.2d. 43 (1937). Consideration of both the offender and the offense in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanizing development ... .
>
> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality, differs more from life imprisonment than a 100 year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Id. at 2991.

This Court upheld the constitutionality of the Texas Death Penalty Statute in Jurek v. Texas, 428 U.S. 262, 96 S.Ct. 2950,

49 L.Ed.2d. 929 (1976), because the Texas Court of Criminal Appeals assured this Court that there would be even-handed review of death penalty cases and this Court believed that the Texas procedure would allow for consideration of all "particularized mitigating circumstances."[1] This, however, has not been the result. See Russell v. State, No. 66, 410 (July 6, 1983) (J. Clinton dissenting). By allowing the Texas Courts to instruct the jury at voir dire, and at punishment, that they may use the law of parties in answering Special Issue Number One at punishment, without requiring that the jury be instructed to consider all mitigating circumstances as well as the aggravating circumstances, the Texas Court of Criminal Appeals has circumvented the entire purpose of the bifurcated sentencing procedure in capital cases.

II.

**V.A.C.C.P. ARTICLE 37.071(b) IS UNCONSTITUTIONAL AS APPLIED IN PETITIONER'S CASE, BECAUSE ITS LANGUAGE INDICATES THAT THE LAW OF PARTIES APPLIES EQUALLY TO GUILT AND PUNISHMENT STAGES OF TRIAL.**

The violation of Petitioner's due process rights resulting from the Court's instructions to the jury that the law of parties as defined by Vernon's Annotated Penal Code §7.02(b) can be used in answering Special Issue Number One at punishment was further compounded by the trial court's refusal to define "deliberately" in Special Issue Number One, as requested by defense counsel. Although the Texas Court of Criminal Appeals has never required that the trial court define the term "deliberately", King v. State, 533 S.W.2d. 105 (Tex.Crim.App. 1977); Beckert v. State, 612 S.W.2d. 549 (Tex.Crim.App. 1981); Morin v. State, No. 69,028

---

1 See J. Stevens concurring in Pulley v. Harris, No. 82-1095 (January 23, 1984), in which he acknowledged that the Texas Statute does not provide for comparative review, but that this Court concluded that the Texas procedure was constitutional because "they assured that sentences of death will not be 'wantonly' or 'freakishly' imposed."

---

(September 14, 1983); Russell v. State, supra, Petitioner asserts that the failure to do so denied him due process of law and violates this Court's recent holding in Enmund v. Florida, supra.

In Enmund, supra, this Court held that the Eighth Amendment prohibits imposition of the death penalty where the Defendant did not kill, attempt to kill, or intend or contemplate that life would be taken. The Texas Court of Criminal Appeals incorrectly relied on the holding of Enmund in affirming Petitioner's conviction because Enmund presupposes that a jury is cognizant of several factors not present in Texas procedure. Jurors in Petitioner's case were not told during voir dire nor instructed at punishment that before a death sentence can be imposed or Special Issue Number One answered they must focus on the accused's own culpability, not that of those who also committed the robbery and shot the deceased.

The term "deliberately" is not statutorily defined in the Texas Code of Criminal Procedure nor the Texas Penal Code. Although the Texas Court of Criminal Appeals has held that in such cases jurors are supposed to know the common meaning of the word, the term, "deliberately" has taken on a technical meaning in the context of Texas capital murder procedure. See (J. Clinton dissenting), Russell v. State, supra. The term "deliberately" as employed in Special Issue Number One was not intended by the Legislature to mean the same thing as "intentionally". However, because even prosecutors and judges occasionally mistakenly inform veniremembers that the two words mean essentially the same thing, Petitioner asserts that it is unreasonable to assume that a jury will know the correct meaning of "deliberately" without being given proper instruction by the Court. Although the Texas courts have held that "'deliberately'" is not the linguistic equivalent of 'intentionally' as used in the charge on guilt/innocence, Beckert v. State, supra, rather, it is the thought process which enhances more than a will to engage in conduct and activates the intentional conduct," Pearence v. State, 620 S.W.2d. 577 (Tex.Crim.App. 1981), the

Texas Court of Criminal Appeals still refuses to require such an instruction be given a capital jury.

In Skillern v. Estelle, 34 Cr.L. 2221 (CA5 December 5, 1983), the U.S. Court of Appeals for the Fifth Circuit was faced with a similar case, which is not only distinguishable from the present case, but also necessitates that this Court again review the constitutionality of the Texas capital murder procedure in light of its current application. In Skillern v. Estelle, supra, the Fifth Circuit held that the instructions given at the sentencing hearing which did not refer to the Texas Law of criminal responsibility simply required the jury to find "beyond a reasonable doubt that Skillern's conduct that caused the death of the deceased or another was committed deliberately and with the reasonable expectation that the victim's death would result," was sufficient in that:

> "It might have been preferable that an additional instruction have been given that the Texas law of a party's criminal responsibility for the act of another did not supply the accused's deliberate intent and reasonable expectation that death would result, a prerequisite for the death penalty."

Therefore, Petitioner asserts that because the Texas Court of Criminal Appeals has held that the law of parties governs the special sentencing issues as well as the underlying conviction of capital murder, Texas law allows the deliberate state of mind of the actual killer to be imputed to a non-triggerman co-defendant, in the absence of any finding by the jury that the non-triggerman co-defendant intended or contemplated that life would be taken.

## III.

**PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE TRIAL COURT'S OVERRULING PETITIONER'S OBJECTION TO THE COURT'S CHARGE TO THE JURY AT THE GUILT/INNOCENCE STAGE OF THE PROCEEDINGS BECAUSE THE CHARGE FAILED TO DEFINE MURDER AND CAPITAL MURDER.**

The courts have consistently held that juries need guidance in applying the law to the facts of a particular case due to their general lack of knowledge of the law. Specific jury

instructions are even more important in capital cases due to the uniqueness of the potential punishment. In **Beck v. Alabama**, **supra**, 100 S.Ct. at 2389, this Court noted:

> "For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense - but leaves some doubt with respect to an element that would justify conviction of a capital offense - the failure to give the jury the 'third option' of convicting of a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant's life is at stake."

In **Beck v. Alabama**, **supra**, this Court held that the death sentence could not be imposed when the jury was not permitted to consider a verdict on guilt of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. In **Beck**, **supra**, as in Petitioner's case, the defendant had been involved in a robbery in which a murder occurred. In **Hopper v. Evans**, **supra**, this Court summarized its decision in **Beck**:

> "[h]e contended, however, that he did not kill the victim or intend his death. Instead he claimed that while he was attempting to tie up the victim, an 80-year-old man, his accomplice, unexpectedldy struck and killed the man. The State conceded that, on the evidence in that case, Beck would have been entitled to an instruction on the lesser included, non-capital offense of felony murder except for the preclusion clause." Id, at 629-630, 100 S.Ct., at 2385-2386.

> Our opinion in **Beck** stressed that the jury was faced with a situation in which its choices were only to convict the defendant and sentence him to death or find him not guilty. The jury could not take a third option of finding that although the defendant had committed a grave crime, it was not so grave as to warrant capital punishment. We concluded that a jury might have convicted Beck, but also might have rejected capital punishment if it believed Beck's testimony. On the facts shown in **Beck** we held that the defendant was entitled to a lesser included offense instruction as a matter of due process. Id. at 637, 100 S.Ct., at 2839." (Emphasis added).

This Court concluded that a jury must be permitted to consider a verdict of guilt of a non-capital offense "in every

case" in which the evidence would have supported a verdict on a lesser included offense. Clearly, the facts of Petitioner's case would have supported a verdict of murder. Petitioner never testified that he ever intended or contemplated that life would be taken. At trial it was never established who actually fired the one fatal shot which killed the deceased. Unlike the defendant in **Hopper v. Evans**, **supra**, Petitioner never testified at any stage of the trial that he had planned to kill anyone during the course of the robbery. In fact, in his confession, Defendant's Exhibit 5, which was admitted into evidence at the punishment hearing, Petitioner denied any intent to kill anyone and blamed Santana for commission of the murder. (R.Vol.XII at 2,3). He further testified that he had agreed to participate in the robbery only on the condition that no one would be injured. (R.Vol.XI at 10-28). Clearly, there was sufficient evidence in which a jury might find Petitioner guilty of murder rather than capital murder. Therefore, Petitioner was denied due process of law by the trial court's refusal to charge the jury on the lesser included offense.

## CONCLUSION

For the reasons stated above, Petitioner prays that this Court grant Petitioner's Petition for Writ of Certiorari.

Respectfully submitted,

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

APPENDIX "A"

JAMES RONALD MEANES, Appellant

NO. 68,901 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

# O P I N I O N

Appeal is taken from a conviction for capital murder. After finding appellant guilty of capital murder, the jury answered "yes" to the two special issues under Art. 37.071(b). Punishment was assessed at death.

Appellant was convicted of intentionally causing the death of Olivero Flores by shooting him with a gun in the course of committing and attempting to commit the robbery of Flores.

The deceased was a guard for the Purolator company. He was murdered on April 21, 1981, in the parking lot of a Sage store near the Gulf Freeway in Houston.

The deceased was walking from the Purolator van toward the store when two shots were fired by appellant or his accomplice, Carlos Santana. Only one bullet entered the deceased's body. Nobody saw whether appellant or Santana fired the fatal shot. After the deceased was killed, both robbers fired continuously into the van where the deceased's partner, Dorothy Wright, was hiding on the floor.

Witnesses to the robbery-murder testified that one of the robbers carried a shotgun and the other carried a pistol. The medical examiner could not determine whether the bullet that killed the deceased came from a shotgun or a pistol.

Two witnesses identified appellant as the robber with a pistol who shot at the van. Several witnesses stated that both robbers fired at the van.

Three witnesses testified that the robber with the pistol entered the Purolator van on the passenger side while the man with the shotgun drove the van away.

Before the deceased was killed, Wright, who is black, heard a black man say "halt." Two shots rang out and Flores fell. The man who yelled "halt," went over to the deceased, bent down, and fired nine shots at the van.

One of the robbers, a black man carrying a pistol, got into the van, pointed his gun at Wright, and said, "Bitch, get out, you're dead." Wright got out and the robbers drove off.

Crime investigator W. E. Kay of the Houston Police Department recovered nine spent shotgun shells, one live shotgun shell, and eleven spent nine-millimeter shells from the crime scene.

Appellant and his accomplice were captured in a cane patch a few blocks from the Sage store. Appellant told Officer G. W. Rainer where the guns were located and Rainer found the guns in a wooded area nearby. The sufficiency of the evidence is not challenged.

In his first ten grounds of error appellant complains that the trial court committed fundamental error by instructing and permitting the prosecutor to instruct veniremen [1/] that the law of parties could be used in answering special issue number one at the punishment stage.

Special issue number one refers to Art. 37.071(b)(1), V.A.C.C.P., which states:

> "(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:
>
> > "(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;"

---

[1/] The ten veniremen in question were subsequently chosen as jurors.

During the voir dire the trial court discussed basic principles of law with each venireman before turning him over to the attorneys for questioning. One of the principles discussed was the law of parties as it relates to the guilt of an accused in a capital case and as it relates to an answer of "yes" to special issue number one at the punishment stage.

The trial court repeatedly used the same hypothetical in explaining the law of parties, as did the State. With one important exception, to be discussed below, the remarks of the trial court and the State on this point did not vary from venireman to venireman.

Representative of these discussions was the following colloquy between the trial court and vehireman Betty Frost:

> "By the court:
>
> ". . .
>
> "Now, the principle of the law of parties is usable to determine, one; is a person guilty or not guilty. It also could be utilized by the jury in answering the first question. The lawyers, in talking with some of the prospective jurors ahead of you, have indicated they believe the evidence may show there were two people involved in this robbery murder out there at the Sage Store on Gulf Freeway on April 21, I believe was the date. It is conceivable--let's think of a fact situation where two people are acting together in the commission of an offense and possibly both have guns but the deceased was only shot one time. Both were shooting but there is only one bullet hole in the deceased. Would you -- could you believe that under those circumstances that the law of parties might make both of them equally liable to a yes answer under the first question and they were both acting deliberately and both should have reasonably foreseen death would result?
>
> "A. If they were both shooting I couldn't see it any other way."

Later, the State questioned Frost as follows:

"Q. Second stage you have to answer these two questions. Now I can't give you a fact situation as to whether you would vote yes or no in that question. What I'm talking about is this. Say when the evidence was all over and you had decided both were equally guilty of the crime and you found them both guilty of capital murder. You find the one guy guilty of capital murder even though he and another guy are involved. You go to answer the questions but when you heard the evidence during the trial itself you never would decide one way or the other because of the facts and the circumstances who pulled the fatal trigger. You decided they both pulled triggers but never sure who. Would that fact alone keep you from answering these questions yes or no? Do you see what I mean?

"A. I understand.

"Q. Would you still be able to answer the question either yes --

"A. Yes. I understand you now.

"Q. It's not you. It is me. I guess one way to put it in a blunt way, like over a cup of coffee, we sometimes use the word triggerman and not only triggerman, and the question I guess I'm asking you is the mere fact you could never decide for sure which one pulled the fatal round off, would that keep you from answering one of these questions yes or could you still in some circumstances answer yes if that is what the evidence called for?

"A. Yes."

Appellant contends that, "The trial court never should have instructed any jurors that they could use the law of parties to answer Special Issue No. One at the punishment stage." He objects to the above instructions and questions, and others virtually identical to them, citing Enmund v. Florida, ___ U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Enmund, decided after appellant's trial, stands for the proposition that the death penalty cannot be imposed in the absence of proof that the defendant

killed, or attempted to kill, or intended or contemplated that life would be taken.

Clearly, the trial court's instruction to venireman Frost did not authorize her to answer special issue number one "yes" in violation of Enmund.

In both the trial court's and the State's hypotheticals, it is assumed that the gunman attempts to kill his victim or intends or contemplates that life will be taken.

By way of contrast, in Enmund the evidence established only that the defendant was sitting in a car outside a farmhouse where his friends were killing an elderly couple.

Lockett stands, inter alia, for the proposition that the trier of fact in a death penalty case cannot be prevented from considering any mitigating circumstance. Lockett and Woodson also stand for the proposition that in capital murder cases the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.

We see nothing in the remarks of the trial court (or the State) to venireman Frost which violates the principles of Lockett and Woodson. The trial court never informed Frost that she had to render a guilty verdict or answer special issue number one yes in the case of the hypothetical gunman who shot but did not hit his target. Instead she was asked by the court, " . . . could you believe that under those circumstances that the law of parties might make both of them equally liable to a yes answer under the first question . . .?" (Emphasis added).

Similarly, the State asked Frost, ". . . could you still in some circumstances answer yes if that is what the evidence called for?" (Emphasis added).

Thus, Frost was never told that she could not consider the character and record of the offender, the circumstances of the offense, or any other mitigating factor. No violation of Lockett or Woodson can be found in the remarks to Frost.

Six of the remaining nine veniremen were instructed in the law of parties in language virtually identical to that used with Frost. There was a small but significant difference, however, with respect to the other three veniremen.

Representative of the questioning of these three was the following exchange between the trial court and venireman Leroy McCarter:

"Q. The law of parties. Two or more people act together in the commission of an offense. I may not have -- we have a principle of law known as the law of parties. That is, if two or more people act together in the commission of an offense they are equally guilty. It goes so far that if one adopts the action of another as his own, they are both equally guilty. A fact situation: Two people go into a bank, both armed. They get in the bank. Committing the robbery, they both shoot. One teller is killed, only one bullet hole in the teller. Both of them -- under those circumstances would you agree they would be equally guilty?

"A. Yes.

"Q. If you will answer out.

"A. Yes.

"Q. The law of parties you could use not only to determine guilt or innocence. You could also use it in answering the first question up there. In the supposed fact situation I gave you. Obviously, under the facts as I told you, only one person actually pulled the trigger that fired the one fatal bullet that killed the teller; right?

"A. Yes, sir.

"Q. But if both of them are in there, both armed and both firing, would you agree whichever one it was that did not fire the fatal bullet still was acting deliberately and with reasonable expectation that death could result?

"A. Yes."

In this discussion and the other two like it, the venireman was not asked if he could or might find the hypothetical gunman who did not fire the fatal shot guilty, or if he could answer special issue number one "yes." The venireman was instead asked, ". . . would you agree they would be equally guilty?" (Emphasis added.) With respect to the punishment stage, McCarter was asked to agree that the gunman, "still was acting deliberately and with reasonable expectation that death could result."

Once again this hypothetical presents no problem under Enmund since the gunman intended or contemplated that life would be taken.

Arguably, the complained of remarks by the court may raise a question under Lockett and Woodson since the veniremen were asked if they would agree under the hypothetical circumstances that both parties were guilty without any mention of mitigating circumstances.

Nevertheless, we do not find that the trial court's remarks constituted reversible error. No objection was made to the allegedly improper remarks, and nothing was preserved for review. Esquivel v. State, 595 S.W.2d 516 (Tex.Cr.App. 1980). Unlike Enmund, both Lockett and Woodson were decided prior to appellant's trial.

Appellant's first ten grounds of error are overruled.

In his eleventh ground of error, appellant complains of ineffective assistance of counsel because his trial attorney failed to object to the court's instructions to veniremen that they could use the law of parties in answering special issue number one.

As we noted in our discussion of grounds of error one through ten, most of the trial court's remarks to the ten veniremen were proper. The arguably improper remarks, given the context in which they were made, were not such that a counsel's failure to object

would render him ineffective. This is true even though the decision in Lockett v. Ohio, supra, was more than three years old at the time.

The remarks were made in the context of trying to explain the law of parties to the jurors as it relates to guilt or innocence and punishment in a capital murder case. The trial court was not attempting to explain what factors, mitigating or otherwise, could be considered at the punishment stage. . . .

An accused is entitled to counsel likely to render and rendering reasonably effective assistance of counsel. Ex parte Duffy, 607 S.W.2d 507 (Tex.Cr.App. 1980).

Generally, ineffective assistance of counsel cannot be established by separating out one portion of the trial counsel's performance for examination. Bolden v. State, 634 S.W.2d 710 (Tex.Cr.App. 1982). The sufficiency of an attorney's assistance must be gauged by the totality of the representation of the accused. Appellant's eleventh ground of error is overruled.

In his twelfth ground of error appellant maintains he was denied effective assistance of counsel when his attorney failed to move to strike for cause every juror listed in grounds of error one through ten because they stated they would treat the culpability of a triggerman and non-triggerman the same in answering special issue number one at the punishment stage. In fact, none of the veniremen stated that they would treat a triggerman and a non-triggerman the same. The hypothetical posed to the veniremen involved two gunmen, one of whom shot at a victim and missed, while his cohort shot and hit the victim. To accept appellant's argument would require us to pass on answers by veniremen which are not reflected by the record. The ground of error is overruled.

In his seventeenth ground of error appellant contends that the trial court erred in denying him a charge on circumstantial

evidence at the guilt-innocence stage. Such a charge is no longer required in Texas. Hankins v. State, 646 S.W.2d 191 (Tex.Cr.App. 1983).

In his eighteenth ground of error appellant asserts that the court's charge on guilt-innocence was fundamentally erroneous because it included an instruction on the law of parties although appellant was never indicted as a party. Appellant is aware of our line of cases holding that a trial court may charge the jury on the law of parties even though there is no such allegation in the indictment. English v. State, 592 S.W.2d 949 (Tex.Cr.App. 1980); Pitts v. State, 569 S.W.2d 898 (Tex.Cr.App. 1978). He urges us to overrule this line of cases. We decline to do so. Appellant's eighteenth ground of error is overruled.

In his fourteenth ground of error, appellant complains that the court erred by granting the State's motion to strike venireman Sandra Gail Richardson. Appellant contends that Richardson was excused in violation of Witherspoon v. Illinois, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 7776 (1968), in that she had not irrevocably committed herself to vote against the death penalty regardless of the facts and circumstances adduced at trial. According to appellant, Richardson was the classic equivocating venireman.

Richardson did give the trial court inconsistent answers as to her ability to answer "yes" to special issues number one and two. She was then turned over to attorneys for the State and appellant for questioning. The following exchange took place between the State and Richardson:

> "Q. . . . Let me ask you do you envision any set of circumstances in your mind where you could participate with the rest of the jury in giving someone the death penalty?

"A. I've thought of this all night long. I knew you were going to ask me this. I honestly would have to say I probably could not give the death penalty.

"Q. Would you say then under no set of circumstances you could give the death penalty; is that right?

"A. That's right. I think that life in prison would do the job.

"Q. So then what you are telling me is that what you told the judge earlier was incorrect, that you could consider the death penalty?

"A. That's correct."

Appellant's counsel then questioned Richardson. After he explained the first two special issues to her, Richardson stated that she could answer them "yes" if the evidence called for it.

The court then intervened and the following dialogue occurred:

"THE COURT: That's contrary to what you stated awhile ago, isn't it?

"JUROR: I'm not following the two questions at all. For some reason my mind is not following those.

"THE COURT: You understand if you answer both the questions yes I will assess the defendant's punishment at death?

"JUROR: I see what you're saying. Okay. My answer is no to that.

". . .

"THE COURT: Mr. Hinton asked you a little while ago if you sat as a juror and you believed those questions should be answered yes, would you answer them yes, and you said, yes, you would, didn't you?

"JUROR: Yes.

"THE COURT: Then I took you and said, that's contrary to what you said to me a few minutes ago, wasn't it?

"JUROR: That's right.

"THE COURT: What is right?

"JUROR: I was not following Mr. Hinton. I would say no to both of those.

"THE COURT: In order to keep the defendant from getting the death penalty; is that the reason?

"JUROR: Yes.

"THE COURT: Sustain the challenge.

". . .

"MR. HINTON: Please note our exception . . ."

Clearly, at this point Richardson was on record as irretrievably opposed to answering the special issues "yes" under any circumstances. Her answers appear to have been well thought out. She explained that her inconsistency resulted from a failure to understand defense counsel's questions. Appellant's counsel did not choose to question Richardson further. Appellant's fourteenth ground of error is overruled.

In his thirteenth ground of error appellant asserts he was denied effective assistance of counsel when his attorney failed to object to the striking for cause of venireman Marie C. Wert due to her purported inability to assess the death penalty.

No such objection was necessary since Wert was properly excused. Wert was questioned closely by the trial court. She was somewhat equivocal in her early answers.

Wert stated that she believed in the death penalty in some cases, but did not know if she could assess it. She also stated she had conscientious scruples against the infliction of death as a punishment in a proper case. Finally, the trial court asked her:

"Q. . . . is your feeling against the death penalty so strong that no matter what the facts were that you as a juror could never vote to assess the death penalty?

"A. I don't think I could.

". . .

"Q. You couldn't, no matter what the circumstances are, you as a juror could never vote to assess the death penalty?

"A. No.

"MR. HARDIN: The state would move --

"THE COURT: Any questions, Mr. Hinton?

"MR. HINTON: Not at this time. The Court would not put the Defense in the posture to ask future prospective jurors --

"THE COURT: No. I'm talking about Ms. Wert.

"I believe under the law I have to excuse you . . ."

It appears Wert was irrevocably opposed to assessing the death penalty and she was not excused in violation of Witherspoon. Thus counsel was under no obligation to object. There is no complaint on appeal that counsel should have questioned Wert further. Appellant's thirteenth ground of error is overruled.

In his fifteenth ground of error, appellant contends the trial court erred by admitting into evidence the bloody shirt worn by the deceased at the time he died.

In Bradford v. State, 608 S.W.2d 918 (Tex.Cr.App. 1980), we held that if a verbal description of the body and scene are admissible, the clothing worn by the victim of the offense, even if bloodstained, is admissible, unless the clothing is offered solely to inflame the minds of the jury.

Appellant contends that the deceased's shirt was offered solely to inflame the minds of the jury. We disagree. Chemist Robert Warkenton testified that the discoloration on the shirt was blood, that the holes in the shirt were bullet holes, that the nitrates on the shirt tended to show that the shot or shots were fired less than four feet from the shirt, and that the pattern of the bullet holes indicated a shotgun could not have been used. The shirt itself could obviously have been useful in emphasizing these relevant points. Appellant's fifteenth ground of error is overruled.

In his sixteenth ground of error appellant contends the trial court erred in denying appellant's objection to the jury charge, because the charge failed to include a definition of murder and capital murder.

Though there was no abstract definition of capital murder or murder in the charge, the court did charge the jury in the following terms in the application paragraph:

> "Now, therefore, if you believe from the evidence beyond a reasonable doubt that in Harris County, Texas, on or about April 21, 1981, the defendant did, either acting alone or together with Carlos Santana as a party (as that term is above defined) while in the course of committing or attempting to commit the robbery of Olivero Flores, intentionally cause the death of Olivero Flores by shooting him with a gun, you will find the defendant guilty of capital murder."

In Quinones v. State, 592 S.W.2d 933, 945 (Tex.Cr.App. 1980), this Court responded to an identical complaint about a jury charge that differed from the one above only with respect to the underlying offense and instruction on parties. There we stated:

> "This charge required the jury to find all of the constituent elements of the offense of capital murder in order to return a guilty verdict. Appellant argues that the charge does not define the offense of murder. This is incorrect. Murder was defined in that portion of the charge which applied the law to the facts and, with the exception of the culpable mental state which the court did define elsewhere, the definition employed terms of common understanding."

Though no objection was made to the jury charge in Quinones, the logic of our reasoning there applies equally well to the instant case.

Capital murder was, in effect, defined in the application paragraph. Appellant does not state how he was harmed by the absence of an abstract charge on capital murder.

As in Quinones, the application paragraph required the jury to find all of the constituent elements of murder. The definition employed terms of common understanding with the exception of the culpable mental state and the concept of parties, which were defined elsewhere in the charge. Appellant's sixteenth ground of error is overruled.

In his final ground of error appellant maintains that Art. 37.071(b)(1) is unconstitutional as applied in this case because, "its language indicates that the law of parties applies in answering it at the punishment stage."

Appellant focuses on the language of special issue number one as applied in the punishment charge which asks the jury to determine whether, "the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result." (Emphasis added.)

Appellant next notes that he testified at the punishment stage and denied firing the bullet that killed the deceased. He further denied any intent or expectation to kill any person and stated that his sole intent was to participate in an armed robbery.

According to appellant, the language of special issue number one, "conduct of the defendant that caused the death of the deceased," interfered with and even prevented the jury from giving proper weight or any weight to his mitigating testimony. The language in question assumed the existence of the issue in

favor of the State, because it assumed that it was the conduct of the defendant, rather than his accomplice, that caused the death of the deceased, before going on to ask if that conduct was committed deliberately and with the expectation that death would result.

We disagree with appellant's analysis. In the first place, special issue number one clearly focuses the jury's attention on the individual defendant by asking if the "conduct of the defendant" was committed deliberately and with the reasonable expectation that death would result.

The question does assume that the defendant's conduct caused the death of the deceased for the very simple reason that the jury has already found this to be so. Before special issue number one can ever be broached, the jury must have determined that a defendant, acting alone or as a party, has committed capital murder.

Appellant notes that the jury might very well have convicted him only as a party and argues, "It is entirely insufficient to say that it was the conduct of the Defendant acting as a party with his co-defendant which caused the death of the deceased. That is an application of the law of parties at the punishment stage." Such an application is prohibited by Enmund v. Florida, supra, under appellant's view.

Underlying appellant's entire thesis is a fundamental misapprehension of Enmund. Enmund does not prevent, under all circumstances, imposition of the death penalty against one convicted, as a party, of capital murder. Enmund prohibits assessment of the death penalty against any defendant who did not kill, attempt to kill, or intend or contemplate that life would be taken.

In the instant case there was ample evidence before the jury that appellant killed, attempted to kill, or intended to kill the deceased.

Further, there is no conceivable way the jury could have convicted appellant and answered special issue number one "yes" on a theory that he was merely a party who did not intend to kill the deceased. The court's charge at the guilt-innocence stage defined criminal responsibility in the language of V.T.C.A. Penal Code, Sec. 7.02(a)(2). The jury was told that:

> "A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense." (Emphasis added.)

The jury found appellant guilty either because he intentionally killed the deceased in the course of a robbery or because he intentionally solicited, encouraged, directed, aided, or attempted to aid Santana in the latter's efforts to kill the deceased in the course of a robbery.

Thus, the jury at the punishment stage, could not have answered special issue number one "yes" in violation of Enmund.

The judgment is affirmed.

TOM G. DAVIS, Judge

(Delivered September 14, 1983)

EN BANC

JAMES RONALD MEANES, Appellant

NO. 68,901 v. - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

CONCURRING OPINION

I agree with Judge Tom Davis's able analysis which concludes no reversible error is presented in this case by either appellant's grounds of error one through ten,[1] or by his final ground of error.[2] Because of their limited factual contexts, the questions posed to selected jurors concerning their ability to answer the deliberateness question "yes" relative to an individual defendant who may not have hit the victim, but who was shooting at him and clearly attempting to hit him, do not compel reversal of appellant's conviction. Accordingly, with but one objective in writing separately, I join the opinion and judgment of the Court.

I write only to make explicit what is clearly implicit in Judge Davis's rationale: It is error to apply directly the law of parties to any of the punishment issues in a capital murder case - that is, so a capital defendant may be punished for the deliberate conduct of another, the future dangerousness of another or the unreasonable response to provocation by another - without regard to the individual conduct of the defendant whose

---

1/ As stated by Judge Davis, appellant's first ten grounds of error complain of the trial court "instructing and/or permitting the prosecutor to instruct veniremen that the law of parties could be used in answering special issue number one at the punishment stage."

2/ According to Judge Davis, appellant's final ground of error claims that "Art. 37.071(b)(1) is unconstitutional as applied in this case because, 'its language indicates that the law of parties applies in answering it at the punishment stage.'"

fate is in question.[3/]

Since the hypothet circumscribing the improper communication here did not require or even lend itself to an application of the law of parties to find "deliberateness," it is in the best tradition of judicial restraint that Judge Davis has avoided directly addressing the viability of Wilder and Armour v. State, 583 S.W.2d 349 (Tex.Cr.App. 1979) which found the evidence of Armour's "deliberateness" sufficient solely on the basis of Wilder's conduct, through application of the law of parties.[4/] Nevertheless, I am alarmed by the increasing number of cases implicating Wilder and Armour and believe it behooves us to provide guidance to the bench and prosecution bar today - to warn them and, hopefully, to avert future reversals of death sentences which are constitutionally infirm[5/] simply because an untenable interpretation of state law technically has not been closely examined by the Court. My purpose then, is to provide that scrutiny.

STATE LAW OF PARTIES

V.T.C.A. Penal Code, §7.01, entitled "Parties to Offenses"

---

[3/] It quickly follows that prospective jurors may not be informed that such an application is permitted, and that it was error in this case to so inform them, albeit not reversible error.

[4/] The evidence was undisputed that Armour was the "wheel man" and waited in the car while Wilder committed the aggravated robbery and, ultimately, the capital murder.

[5/] See Enmund v. Florida, ____U.S.____, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982).

provides:

> (a) A person is criminally responsible as a party to an OFFENSE if the offense is committed by his own conduct, the conduct of another for which he is criminally responsible, or by both.
>
> (b) Each party to an offense may be charged with commission of the OFFENSE.
>
> (c) . . . [E]ach party to an offense may be charged and CONVICTED without alleging that he acted as a principal or accomplice.

V.T.C.A. Penal Code, §7.02, entitled "Criminal Responsibility for Conduct of Another" provides:

> (a) A person is criminally responsible for an OFFENSE committed by the conduct of another if:
>
> * * *
>
> (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense; * * *
>
> (b) If, in the attempt to carry out a conspiracy to commit one felony, 6/ another felony is committed by one of the conspirators, all conspirators are GUILTY of the felony actually committed though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

It is unambiguous that the law of parties provided by the penal code applies only to the jury's consideration of an accused's guilt for the commission of an offense in the first stage of our

---

6/ "'Felony' means an OFFENSE so designated by law or punishable by death or confinement in a penitentiary." (All emphasis is supplied throughout by the writer of this opinion unless otherwise indicated.)

bifurcated felony trial procedure.[7]

This conclusion is fortified by the language of Article 37.071(b)(1)-(3), V.A.C.C.P. which provides unique criteria for assessment of the penalty of death in capital cases; the so-called "special issues" have been framed in parallel construction by the Legislature and, as Judge Davis also observes, each issue clearly directs consideration of the conduct of the individual defendant:

> (1) whether the conduct [8] of the defendant that caused the death was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
>
> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
>
> (3) if raised by the evidence the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

While it is true that submission of these special issues is mandatory in assessing the penalty for one found guilty of the offense of capital murder through application of the law of

---

[7] Article 37.07, §2(a) directs:

> In all criminal cases, other than misdemeanor cases. . . , which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

[8] "'Conduct' means an act or omission and its accompanying mental state." V.T.C.A. Penal Code, §1.07(a)(8).

"'Act' means a bodily movement whether voluntary or involuntary and includes speech." V.T.C.A. Penal Code, §1.07(a)(1).

parties, it is improper to assume that those issues must be answered for such a defendant exactly as they would be for a codefendant whose conduct actually caused the death involved.[9/] Obviously, the culpable "conduct" of codefendants is different, and though the "criminal responsibility" for purposes of a determination of guilt is the same, once a finding of guilt is made, the jury is confronted with substantively different questions[10/] regarding the propriety of punishment for the individual defendants.

It is apparent then that while a capital murder defendant may be held "criminally responsible" - and therefore found guilty - through application of our law of parties, the determinations made by the jury in answering the special issues

---

9/ In discussing the tenet that individualized sentencing in capital cases is constitutionally required, the Supreme Court of the United States noted, in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), at 2964 S.Ct.:

> "That States have authority to make aiders and abettors equally responsible as a matter of law, with principals, or to enact felony murder statutes is beyond constitutional challenge. But the definition of crimes generally has not been thought automatically to dictate what should be the proper penalty. [citations omitted]"

10/ Against the constitutional challenge that the special punishment issues in the Texas capital murder scheme "merely repeat issues already decided" at the guilt phase, then Texas Attorney General John L. Hill assured the United States Supreme Court that, as drafted, the punishment issues had been (and impliedly, would be) construed as showing "a real basis for distinguishing among defendants." Oral argument on the constitutionality of Texas death penalty procedure in Jurek v. Texas, 19 CrL 4007 (1976). Accord: Heckert v. State, 612 S.W.2d 549 (Tex.Cr.App. 1981) [holding "intentionally" is not the same as "deliberately"].

dictated by Article 37.071(b), supra, must be made solely upon consideration of the particularized conduct of the individual defendant which, by virtue of §§7.01 and 7.02, supra, contributed to another's causing the death of the victim.

Thus, it can be seen that the suggestion in Wilder and Armour that the law of parties can supply evidence otherwise lacking upon a punishment issue, is patently unsupported by the language of pertinent state statutes.

ERRONEOUS READING OF PRIOR DECISIONS

But then the opinion in Wilder and Armour did not undertake the analysis of relevant state statutes which is made above; instead, that opinion simply claimed prior decisions - primarily Livingston v. State, 542 S.W.2d 655 (Tex.Cr.App. 1976) - "held that Sections 7.01 and 7.02 apply to. . . Article 37.071, V.A.C.C.P." 583 S.W.2d at 356. However, dissecting the decisions cited by Wilder and Armour belies the accuracy of that claim.

In Smith v. State, 540 S.W.2d 693 (Tex.Cr.App. 1976) this Court in passing upon the sufficiency of the evidence to support the death penalty "generally," stated at 696-697:

> There was no evidence that [Smith] was in any way under the domination of anyone, nor was he under any mental or emotional pressure. He simply went out to rob and was the first person who tried to kill his victim (according to his oral confession). 11/ After the killing, he

---

11/ According to Smith's oral confession, he attempted to shoot the victim, but his gun misfired; he then called out to his coprincipal "get him" and Howie Ray Robinson shot the victim to death.

> testified, he paused long enough to secure a pistol from under the counter and when a cigar box containing coins spilled, he paused to recoup the coins. His entire conduct was calculated and remorseless. . . .

These facts were held to be sufficient to support the jury's finding on the deliberateness question and, indeed, correctly so. However, Smith also argued on appeal that Special Issues (1) and (3) should not be submitted in a case where the defendant is only charged and found guilty as a principal. In rejecting such a contention, the Court stated:

> To agree with such a contention would require that we ignore this Court's interpretation of the law of principals. Earlier in the opinion we declined to do so.

540 S.W.2d at 697.

Earlier in the opinion the Court had determined, contrary to Smith's contention, that upon application of the law of principals, the evidence was sufficient to support the conviction, or, to restate it, the jury's finding of guilt for the offense of capital murder.

Thus, the Court did not determine in Smith, supra, that the deliberate conduct of Howie Ray Robinson which caused the death of the victim in that case, constituted sufficient evidence to support the jury's finding on the first special issue in Smith's trial. Rather, it was conduct of the individual defendant, Smith, which aided and encouraged Robinson in causing the death, 12/

---

12/ The law in effect at the time of the commission of the capital murder in Smith which authorized the jury's finding of guilt follows:

> "All persons are principals who are guilty of acting together in the commission of an offense."

Vernon's Ann. P.C., Article 65.

Footnote 12 continued -

that justified the jury's affirmative finding in his own trial.

In Livingston, supra, the appellant assailed the sufficiency of the evidence to support the jury's verdict of guilt. In rejecting the contention, the Court held:

> In Smith [citation omitted], a capital murder conviction under Article 1257, Vernon's Ann. P.C. (immediate forerunner of V.T.C.A. Penal Code, Sec. 19.03), and Art. 37.071, it was held that a defendant could be convicted of murder despite the fact that it was the co-defendant who killed the deceased during the course of the robbery in light of the law of principals then in effect. See also Thompson v. State, 514 S.W.2d 275 (Tex.Cr.App. 1974).
>
> We do not construe. . . Sections 7.01 and 7.02 of the new penal code to call for a different result, nor do we understand appellant to so contend.

542 S.W.2d 660.

So, in both Smith and Livingston, the Court approved the application of the law of criminal responsibility to the guilt

---

Footnote 12 continued -

> "When an offense is actually committed by one or more persons, but others are present, and knowing the unlawful intent, aid by acts or encourage by words or gestures, those actually engaged in the commission of the unlawful act, or who, not being actually present, keep watch so as to prevent the interruption of those engaged in committing the offense, such persons so aiding, encouraging or keeping watch are principal offenders."

Vernon's Ann. P.C., Article 66.

> "All persons who shall engage in procuring aid, arms or means of any kind to assist in the commission of an offense, while others are executing the unlawful act, and all persons who endeavor at the time of the commission of the offense to secure the safety or concealment of the offenders are principals."

Vernon's Ann. P.C., Article 68.

> "Any person who advises or agrees to the commission of an offense and who is present when the same is a principal whether he aid or notice the illegal act."

Vernon's Ann. P.C., Article 69.

phase of those capital murder trials, and concomitantly found the evidence sufficient to sustain the jury verdicts that those defendants were guilty of the respective capital murder offenses charged against them. The dispositions of Smith and Livingston in this regard, are clearly sound.

But, in neither Smith nor Livingston, was the evidence deemed sufficient to support the affirmative finding on the first punishment issue in those capital murder cases, through application of the law of parties, as the opinion in Wilder and Armour would have it.

It is also important to note the exact contention made by Armour on appeal; according to the Court's opinion:

> "In his first ground of error, Armour alleges that the evidence was insufficient under Article 37.071, V.A.C.C.P., to show he either caused the death of the deceased or committed the act deliberately and with the reasonable expectation that death would result because he did not actually kill the deceased."

583 S.W.2d at 356. Obviously, the fact that a defendant "did not actually kill the deceased" does not necessarily mean that his own culpable conduct[13/] in contributing to the murder was not done "deliberately and with the reasonable expectation that the death of the deceased. . . would result." The facts in both Smith and the instant case exemplify instances in which nontriggermen[14/] were shown by their contributing conduct to be not only

---

13/ "Culpable" by virtue of the law of parties.

14/ As I understand the facts in the instant case, there was simply inconclusive evidence as to whether it was appellant or his confederate who fired the fatal bullet.

expecting a resulting death, but also offering deliberate assistance to that end; and the jury's respective "yes" answers on the "deliberateness question" find ample support in the evidence in each case.

Thus, the opinion in Wilder and Armour relied upon an erroneous reading of Livingston and Smith for its conclusion that the jury may find affirmatively on the "deliberateness question" at the trial of a "wheel man," if they only find that the "triggerman's" conduct was committed deliberately and with the reasonable expectation that the death of the deceased would result. By virtue of the misplaced reliance, a careful analysis of the issue was apparently thought to be unnecessary in Wilder and Armour; but, as I have demonstrated, scrutiny of the purported rationale of that case mandates our disapproval of it.

There is no conceivable way an application of the law of parties to the punishment issues in appellant's trial could have contributed to his death sentence;[15/] so, erroneous communication to selected jurors that such an application be made was harmless beyond a reasonable doubt.

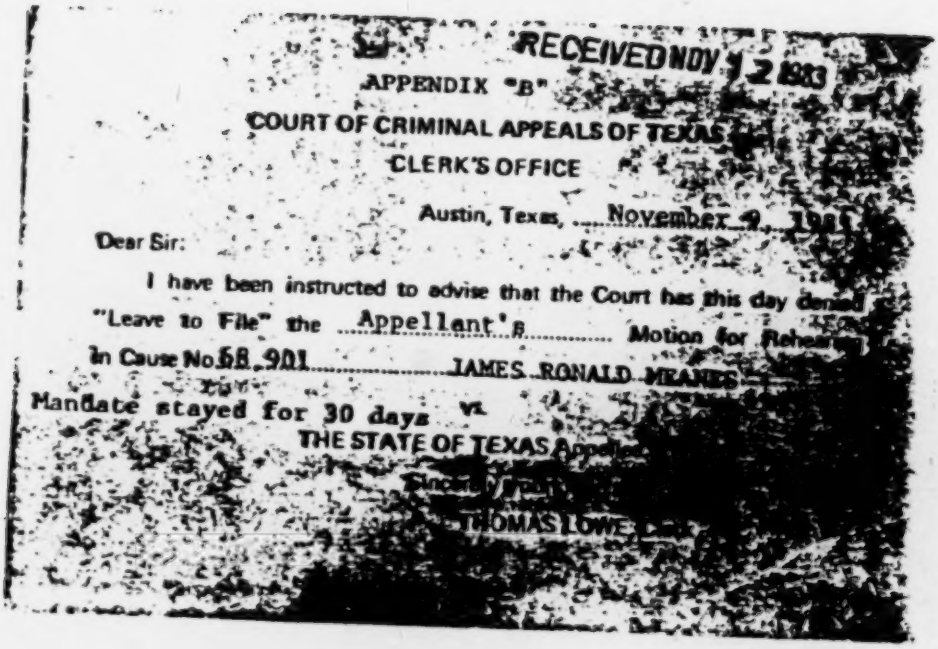
I concur in the opinion and judgment of the Court.

CLINTON, Judge

(Delivered September 14, 1983)
EN BANC
PUBLISH

---

15/ But that is not to say, of course, that the law of parties has any application to sufficiency of evidence to support a finding on the deliberateness issue.



RECEIVED NOV 12 1981

APPENDIX "B"

COURT OF CRIMINAL APPEALS OF TEXAS

CLERK'S OFFICE

Austin, Texas, November 9, 1981

Dear Sir:

I have been instructed to advise that the Court has this day denied "Leave to File" the Appellant's Motion for Rehearing in Cause No. 58,901 JAMES RONALD MEARES

Mandate stayed for 30 days vs.

THE STATE OF TEXAS Appellee

Sincerely,

THOMAS LOWE, Clerk

83-6231

NO. _____

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1984



---



JAMES RONALD MEANES, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

---



MOTION FOR LEAVE TO PROCEED
INFORMA PAUPERIS

---

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
JANUARY TERM, 1984

---

JAMES RONALD MEANES, PETITIONER

VS.

THE STATE OF TEXAS, RESPONDENT

---

MOTION FOR LEAVE TO PROCEED
INFORMA PAUPERIS

---

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

COMES NOW, JAMES RONALD MEANES, Petitioner in the above entitled and numbered cause, by and through his attorney, STANLEY G. SCHNEIDER, and files this Motion for Leave to Proceed Informa Pauperis, and would show this Honorable Court that Petitioner has been continuously incarcerated since his arrest and is indigent and Petitioner's counsel was appointed by the Court to represent him. Petitioner's Affidavit of Poverty is attached hereto as Appendix "A".

WHEREFORE, PREMISES CONSIDERED, Petitioner prays this Court for leave to proceed on appeal informa pauperis.

Respectfully submitted,

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

GAIL ROTENBERG
LEGAL INTERN

CERTIFICATE OF SERVICE

On this the 6th day of February, 1984, a true and correct copy of the foregoing was mailed to Leslie Benetiz, Assistant Attorney General of Texas, State Capitol, Austin, Texas.

STANLEY G. SCHNEIDER

APPENDIX "A'

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM 1983

---

JAMES RONALD MEANES,

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

---

IN FORMA PAUPERIS AFFIDAVIT

---

STANLEY G. SCHNEIDER 17790500
1700 West Loop South, Suite 1170
Houston, Texas 77027
713 961 3096

ATTORNEY FOR PETITIONER

IN THE
UNITED STATES SUPREME COURT
OCTOBER TERM 1983

---

JAMES RONALD MEANES

PETITIONER

VS.

THE STATE OF TEXAS,

RESPONDENT

---

IN FORMA PAUPERIS AFFIDAVIT

---

TO THE HONORABLE BYRON R. WHITE, Associate Justice of the Supreme Court of the United States, and Circuit Justice for the Fifth Circuit:

Petitioner, James Ronald Meanes, moves that he be permitted to file the attached application for writ of certiorari in forma pauferis and to proceed in forma pauferis. In support of this motion, Petitioner states under oath the following facts:

I, James Ronald Meanes, being first duly sworn, depose and say that I am the Petitioner in the above entitled case; that in support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to

give security therefor; that I believe I am entitled to relief.

I further swear that the responses which I have made to questions and instructions below are true.

1. Are you presently employed? Yes____ No ✓

   a. If the answer is "yes", state the amount of your salary or wages per month, and give the name and address of your employer.

   b. If the answer is "no", state the date of last employment and the amount of the salary and wages per month which your received.

   November, 1980; Hourly wage was $6.25

2. Have you received within the past twelve months any money from any of the following sources?

   a. Business, profession or form of self-employment?
   Yes____ No ✓

   b. Rent payments, interest or dividends?
   Yes____ No ✓

   c. Pensions, annuities or life insurance payments?
   Yes____ No ✓

   d. Gifts or inheritances?
   Yes____ No ✓

   e. Any other sources?
   Yes ✓ No____

   If the answer to any of the above is "yes", describe each source of money and state the amount received from each during the past twelve months.

   family members; approximately one hundred dollars.

3. Do you own cash, or do you have money in a checking or savings account?

Yes ✓ No _____ (Include any funds in prison accounts)

If the answer is "yes", state the total value of the items owned.

At present, I have five dollars and seven cents in my Inmate Trust Fund.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)?

Yes _____ No ✓

If the answer is "yes", describe the property and state its approximate value _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute toward their support.

I understand that a false statement or answer to any questions in this affidavit will subject me to penalties for prejury.

James Ronald Meanes
JAMES RONALD MEANES, PETITIONER

THE STATE OF T E X A S §

COUNTY OF Walker §

James Ronald Meanes, Petitioner, being first duly sworn under oath, presents that he has read and subscribed to the above and states that the information therein is true and correct.

James Ronald Meanes
JAMES RONALD MEANES, PETITIONER

SUBSCRIBED AND SWORN TO before me on this the 14 day of Oct, 1983.

Notary Public in and for
The State of T e x a s

My Commission Expires: 1-25-86

CERTIFICATE

I hereby certify that the PETITIONER herein has the sum of $ 224 on account to his credit a the Ellis Unit Texas Dept of Corrections institution where he is confined. I further certify that PETITIONER likewise has the following securities to his credit according to the records of said TDC institution:

J Bayley Lt
Authorized Officer of
Institution